DATE: December 30, 1998

CASE NO: 96-INA-291

In the Matter of

PHILLIP MAXWELL & JULIA MARTELLI
Employer

on behalf of

ALICIA ZUNIGA-BURCIAGA
Alien

Appearances: David Neumeister, Esq.
For Employer and Alien

Before: Holmes, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Phillip Maxwell & Julia Martelli's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On March 12, 1992, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Alicia Zuniga-Burciaga. (AF 68). The job opportunity was listed as a live-in child monitor. The Employer offered wages of $195.00 per week. The stated job requirement for the position, as set forth on the application, included 3 months in the job offered. (Id.).

EDD transmitted resumes of 5 U.S. applicants to the Employer. (AF 67). The Employer's Results of Recruitment Report dated August 8, 1992, indicated that none of the applicants was hired. (AF 77-78). The file was transmitted to the CO. (AF 67).

The CO issued a Notice of Findings ("NOF") on September 25, 1992, proposing to deny certification because the Employer failed to offer the prevailing wage in violation of Sections 656.21(e) and 656.40(a)(2)(i). (AF 62-65). The CO found that the prevailing wage was $308.00 per week based on a wage survey conducted by EDD's Labor Market Information Division ("LMID"). (AF 63).

The Employer submitted its rebuttal dated October 29, 1992. (AF 57-59). The Employer provided their own wage survey which consisted of 3 local employers of live-in child monitors as well as the only employment agency in Bakersfield that provides child monitors. They determined that the prevailing wage for a live-in child monitor in Kern county was $200 per week. (AF 57-58). The Employer also identified 6 other local employers who pay their live-in child monitors from $160 to $200 per week. (AF 58-59). In addition, the Employer argued that the CO failed to explain how the prevailing wage was determined, and the CO previously granted 2 applications for the exact same position in the same area with wage offers of $175 and $191 per week. (AF 58).

The CO rejected the Employer's rebuttal and issued a Final Determination ("FD") on February 1, 1993, denying certification. (AF 54-56). The CO found that the LMID survey correctly determined the prevailing wage. The survey was a random sample of California employers who pay unemployment insurance taxes. The CO rejected the Employer's survey because it was not a random sample - the Employer had contacted individuals that they knew in Bakersfield. In regards to the two

prior applications that had been approved utilizing lower prevailing wages, the CO stated that those applications had been certified in October and December 1991 when an earlier wage survey was in effect. (AF 55-56).

The Employer filed a timely Request for Reconsideration and Review dated February 8, 1993. (AF 43-53). The Employer argued that the CO was mistaken regarding the approval of the two prior applications. The Employer stated that the same wage survey was in effect for those applications and this application. (AF 44). The CO denied the Request for Reconsideration and forwarded the case to the Board for review. (AF 42).

The panel determined that the LMID wage survey was in error. They found that the survey was based on the entire state of California rather than the intended area of employment. Since the panel also rejected the Employer's wage survey, the case was remanded back to the CO. *See Phillip Maxwell And Julia Martelli*, 93-INA-522 (Sept. 23, 1994).

The CO issued a Supplemental NOF on February 1, 1995, proposing to deny certification based on the Employer's failure to offer the prevailing wage. (AF 18-23). The CO obtained a new survey which indicated that the prevailing wage was $275 per week. This survey included the following counties: Imperial, Kern, Santa Barbara, San Luis Obispo and Ventura. (AF 20).

The Employer submitted its rebuttal dated March 7, 1995. (AF 8-12). The Employer argued that the second LMIC wage survey was invalid because it did not represent the area of intended employment; it was again too broad. (AF 8-9). The Employer again argued that its prior wage survey of 9 employers represented the area of intended employment. (AF 11-12).

The CO rejected the Employer's rebuttal and denied certification on April 27, 1995. (AF 4-7). On May 12, 1995, the Employer filed a Request for Reconsideration or Review. (AF 2-3). The CO denied the Request for Reconsideration on June 26, 1995, and forwarded the case to the Board for review. (AF 1).

Discussion

When challenging a CO's prevailing wage determination, an employer bears the burden of establishing both that the CO's determination is in error and that the employer's wage offer is at or above the correct prevailing wage. *PPX Enterprises, Inc.*, 88-INA-25 (May 31, 1989) (*en banc*).

Section 656.20(c)(2) requires an employer to offer a wage that equals or exceeds the prevailing wage as determined under Section 656.40.[1] The prevailing wage for labor certification shall be: "The average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment

[1]Actually, the wage offered must be at least 95% of the prevailing wage. *See* 656.40(a)(2)(i).

and dividing the total by the number of such workers." Section 656.40(a)(2)(i). The area of intended employment is: "the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Standard Metropolitan Statistical Area (SMSA), the SMSA is deemed to be any place within normal commuting distance of intended employment." Section 656.3.

Here, the intended place of employment is Bakersfield, a city of over 200,000 residents located in Kern County in Southern California. LMID's latest survey includes the counties of Kern, Imperial, Santa Barbara, San Luis Obispo, and Ventura. (AF 26). The survey does not indicate that these counties are part of a Standard Metropolitan Statistical Area (SMSA), but instead refers to them as part of a geographical area titled "Balance of Southern California." (Id.). The average hourly wage for this region was $6.88 which translates to $275.20 per week.

We agree with the Employer that the wage survey does not represent the area of intended employment. Santa Barbara, San Luis Obispo and Ventura are all coastal counties with their own central cities.[2] Kern is an inland agricultural county and Imperial is a desert county in the far south-eastern corner of the state. Imperial County is not contiguous to Kern County, and none of these counties are within a normal commuting distance of Bakersfield. The survey included 14 workers in these five counties, but there is no indication whether any were from Kern county. The CO's survey is again too broad.

The Employer also argues that the wage survey failed to take into account that the Employer was offering a live-in position. We agree. The LMID survey is for an "In-Home Child Care Worker." (AF 26). The occupational definition was: "provides care in the children's private home. May clean parts of home but that is not the primary duty." (Id.). This survey does not distinguish between a **live-in** and live-out position; rather, it simply mentions that the job duties are to be performed in a private home. This is a significant error. *See, e.g., Sinta Lukito*, 91-INA-284 (Oct. 27, 1992). Therefore, the survey should have been confined to live-in workers.

The Employer re-submitted its prior wage survey. This survey included 9 employers in Kern County and indicated a prevailing wage of $176 per week.[3] (AF 58-59, 71). The prior panel rejected this survey because it was not in compliance with Section 656.40(a)(2)(i). The panel found that:

> The Employers go the opposite way, shrinking the applicable area to the municipality of Bakersfield itself, and even including an employment agency, which is not an employer, in their calculations. However, the regulations do not support a contention that the particular section of a Metropolitan Statistical Area (MSA) in which the

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[2]For example, the cities of Santa Barbara, San Luis Obispo, and Oxnard are all significant cities in these counties. Furthermore, for the occupation of Housekeeper, Santa Barbara, Santa Maria and Lompoc constitute a MSA. *See Yvonne Munoz*, 94-INA-399 (Aug. 17, 1995).

[3]This wage does not include the Bakersfield Employment Agency data.

> offered job is located should be controlling in determining the prevailing wage. On the contrary, there is no provision in the regulations for determining prevailing wages in sections of an MSA. There being no suggestion to the contrary, any location within the MSA is deemed to be within normal commuting distance — that is, within the "area" — of intended employment, for which the operative prevailing wage is not to be determined block by block, or neighborhood by neighborhood, or town by town; rather, it is wage data throughout the MSA that determines the prevailing wage for a job within it.

(AF 30).

We agree with the prior panel that a wage survey may be invalid if its target area is too narrow. *See, e.g., Se Jin Auto Repair And Body Shop*, 94-INA-625 (Aug. 16, 1996) (employer's survey only included businesses in the "Korean Town" area of Los Angeles). However, here, it is not clear whether the Employer has segmented the MSA. First, we note that EDD's wage survey does not include an MSA for Bakersfield. (AF 26). Section 656.3 seems to imply that not every city will necessarily fall into an MSA. Therefore, if there is no MSA, the intended area of employment would be the area of normal commute distance. *See* Section 656.3. It appears that the normal commuting area for Bakersfield would be Kern County. Second, Bakersfield might be in an MSA. The U.S. Office of Management and Budget defines an MSA as:

> [A] county or group of contiguous counties which contains at least one central city of at least 50,000 inhabitants or a central urbanized area of at least 100,000. Counties contiguous to the one containing such a city or area are included in an MSA if, according to certain criteria, they are essentially metropolitan in character and are socially and economically integrated with the central city.

Seibel & Stern, 90-INA-86 (April 26, 1990). Using this definition, Kern County might be the appropriate MSA for Bakersfield. Therefore, regardless of whether there is an MSA for Bakersfield, it appears that the area of intended employment should cover Kern County.

The Employer's wage survey consists of 9 employers in Kern County. The survey listed the names, addresses and telephone numbers of the employers along with the job title and wages paid. The cities represented are: 1 in Wasco, 1 in Shafter, and 7 in Bakersfield (located in 6 different zip codes). (AF 58-59, 71). While the Employer never indicated whether it surveyed the entire county, their results indicate that they covered a substantial portion of the area of intended employment. We also note that Bakersfield is the only city of substantial size in Kern County. However, the Employer's survey was not entirely random since the Employer primarily contacted individuals that were known to them.

Finally, there are 2 other pieces of evidence that support the accuracy of the Employer's wage survey. First, the employment agency in Bakersfield indicated that the standard wage was $5 per

hour which translates into $200 per week. (AF 71-72). While this evidence is not appropriate for inclusion in a wage survey, it does lend support to the Employer's wage survey results. Second, the CO previously approved two applications for the same occupation in Bakersfield at prevailing wage rates below the Employer's offer. The CO originally argued that those applications were based on an older wage survey (AF 56), but now the CO argues that those applications were approved in error. (AF 7). While the CO is not bound by his prior decisions, he cannot simply ignore the wage survey evidence from prior cases. *See Connecticut Muffin Company*, 91-INA-16 (Aug. 5, 1992). The fact that two other employers, whose applications were approved, offered wages that are comparable to the Employer's wage survey further supports the validity of the Employer's survey.

We find that the LMID wage survey is flawed because it does not represent the area of intended employment and does not take into account the difference between live-in and live-out positions. The Employer's wage survey is also flawed because it was not random. However, since it appears that the Employer's survey is within the "ballpark," and considering that this case has already been remanded once before and is now over 6 years old, a second remand would not be appropriate. The Employer's wage offer of $195 per week is above the wage of $176 per week which was determined in the Employer's survey.[4] Therefore, certification should be granted.

Order

The Final Determination denying certification is hereby **REVERSED**, and the Certifying Officer is directed to grant certification.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California

[4]The prevailing wage is determined as of the date the CO reviews the application. See 20 C.F.R. § 656.20(c)(2). However, during the review process, California's minimum wage has increased to $5.75 per hour which equals $230.00 per week. See Cal. Labor. Code § 1182.11. The Employer must also comply with the minimum wage law.